Press Summary

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A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998

[2026] UKSC 16

Justices: Lord Reed (President), Lord Hodge (Deputy-President), Lord Lloyd-Jones, Lord Sales, Lord Stephens, Lady Rose, Lady Simler

Background to the Appeal

This case concerns the question of what counts as a "deprivation of liberty" under article 5(1) of the European Convention on Human Rights ("**the Convention**") for adults who do not, as a matter of domestic law, have mental capacity to make their own decision about their residence and care arrangements, and who are living in community care settings which amount (or potentially amount) to confinement. Specifically, the case raises the question of whether such an adult can "validly consent" to their confinement (such that it is not a deprivation of liberty within the meaning of article 5), even though they do not have full mental capacity to make a decision about their living arrangements.

Article 5(1) ECHR provides that "*everyone has the right to liberty and security of person,"* and that "*no one shall be deprived of his liberty"* save in specified circumstances and in accordance with a procedure prescribed by law. Article 5(4) provides that "*everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

The European Court of Human Rights ("**the Strasbourg court**") has held that a deprivation of liberty for the purpose of article 5 has both an objective and a subjective element. The objective element is satisfied where the person is confined to a particular restricted space for a material period of time, and an important aspect of the subjective element is that it may be satisfied where there is no "valid consent" to that confinement given by an individual with awareness of the situation they are in. The meaning of "valid consent" in this context, and its relationship to the domestic law concept of mental capacity, are important issues in this case.

In Northern Ireland, the question of whether a person lacks mental capacity to make a particular decision (including a decision about their residence and care arrangements) is answered by applying the statutory test contained in section 3 of the Mental Capacity Act 2016 ("**MCA**

2016"). That test considers whether the person is able to understand, retain, appreciate, use and weigh the information relevant to the decision, and communicate their decision; and, if they are unable to do so, whether that inability is caused by an impairment or disturbance in the functioning of their mind or brain. The statutory provisions for determining capacity in the law of England & Wales are materially the same.

In 2015, in an English case called *Cheshire West* (*Cheshire West and Chester Council v P* [2014] UKSC 19; [2014] AC 896), the Supreme Court had to determine whether three adults who lacked mental capacity to make a decision about their living arrangements were subject to a deprivation of liberty within the meaning of article 5 of the Convention. By a majority, the Supreme Court held that the "*acid test"* for a deprivation of liberty is whether an individual is subject to "*continuous supervision and control"* and "*not free to leave."* The conventional understanding of *Cheshire West* is that the Supreme Court endorsed the equation of lack of mental capacity with lack of "valid consent" for the purposes of establishing whether or not there has been a deprivation of liberty.

The result of that conventional understanding is that where a person lacks mental capacity to make a decision about their living arrangements, and their actual living arrangements satisfy the "*acid test"* (ie the person is subject to continuous supervision and control, and is not free to leave), they are to be treated as being deprived of their liberty for the purposes of article 5. This means that their deprivation of liberty must be subject to safeguards: it must be "*in accordance with a procedure prescribed by law"* (article 5(1)), and the detainee is entitled to "*take proceedings by which the lawfulness of* [*the*] *detention shall be decided speedily by a court"* (article 5(4)).

In Northern Ireland, those safeguards find their expression as a matter of domestic law in the MCA 2016, including provisions contained in schedules to that legislation and in a code of practice (the Deprivation of Liberty Safeguards Code of Practice) issued by the Minister of Health for Northern Ireland under powers set out in section 288(1) of the MCA 2016. The code of practice has statutory force in that various persons (including those acting in a professional capacity) who take decisions in relation to an adult who lacks capacity for the purposes of the MCA 2016 "*must have regard to it"* (section 289(1) and (2)(a) of the MCA 2016).

The Minister of Health for Northern Ireland now seeks to issue a revised code of practice under section 288(4) of the MCA 2016, to replace the existing code of practice. The revised code would provide (contrary to *Cheshire West*) that even where a person lacks mental capacity to make decisions about their residence and care arrangements, they can nevertheless give valid consent to those arrangements through the expression of current wishes and feelings that go beyond mere acquiescence regarding their confinement.

The question raised by this reference is whether revising the code in this way would be incompatible with article 5 of the Convention. If it would be, then the Minister does not have the power to make the proposed revisions, because section 24 of the Northern Ireland Act 1998 provides that "*a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act- (a) is incompatible with any of the Convention rights."*

The Attorney General for Northern Ireland therefore makes this reference to the Supreme Court, for a determination of the question whether the Minister would be acting incompatibly with article 5 of the Convention in issuing the revised code. In order to answer that question, the Supreme Court must decide whether the majority in *Cheshire West* erred in their interpretation of article 5, and if so whether the Supreme Court should now correct that interpretation.

Judgment

The Supreme Court unanimously holds that the Minister would not be acting incompatibly with article 5 of the Convention in issuing the revised code, and that it is therefore within his competence to issue the revised code. Lord Sales and Lady Simler give the judgment, with which Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Stephens and Lady Rose agree.

Reasons for the Judgment

The Supreme Court begins by clarifying the test which it must apply in order to determine whether or not in issuing the revised code of practice the Minister would be acting incompatibly with article 5. The question is whether the revised code authorises or approves unlawful conduct in a significant number of cases in the form of a breach of Convention rights of individuals **[39].**

If the decision in *Cheshire West* was correct in its interpretation of deprivation of liberty for the purposes of article 5, the revised code would involve the authorisation or approval of treatment of persons with impaired mental capacity by care providers in settings which in many cases would constitute an unlawful deprivation of liberty. It would therefore be outside the competence of the Minister to issue it **[40**].

However, the Supreme Court finds that the majority in *Cheshire West* erred in their analysis of the Strasbourg court's case law regarding the meaning of deprivation of liberty in article 5 and in the interpretation they gave to that term **[42].** The Supreme Court decides that it is appropriate to depart from the decision in *Cheshire West* **[51]**.

<u>The Strasbourg court's approach to deprivation of liberty</u>

The Supreme Court analyses the Strasbourg court's case-law on article 5, both in general and in the context of deprivation of liberty in circumstances of mental impairment. The Supreme Court summarises the applicable principles at **[53].**

Article 5 is concerned with the physical liberty of the person; it is not concerned with mere restrictions on liberty of movement. The starting point in assessing whether someone has been deprived of their liberty within the meaning of article 5 is the specific situation of the individual concerned. That assessment is multifactorial and takes account of a range of factors including the type, duration, effects and manner of implementation of the measure in question **[118]**. No single factor is determinative. The required focus on the "*concrete situation"* of the individual and the "*realities of the situation"*, taking account of the type of measure in question, means that it is relevant to have regard to the purpose of the measure, even though this is not decisive by itself **[130]-[134].**

The difference between deprivation and restriction of liberty is one of degree or intensity, not one of nature or substance **[119].** Distinguishing between a deprivation of liberty and a mere restriction on liberty of movement is not easy and will be particularly difficult in borderline or marginal cases **[127].** The approach should be practical and realistic. In difficult or borderline cases, the paradigm of imprisonment in a cell is a useful comparator.

There is an overlap between the objective and subjective elements of a deprivation of liberty. The assessment of the objective element can take account of the specific context and circumstances of the restrictive measures that are different from the paradigm of confinement in a cell. The effect of restrictions on an individual, including their compliance and lack of objection (if they are capable of giving tacit agreement) is relevant in assessing the objective element of confinement. The relative normality of a placement is also relevant in this assessment. Similarly, in situations that are far from the paradigm of confinement in a cell, the purpose for which a measure has been taken is a factor to be considered **[53(iv)].** The closeness of an analogy with the paradigm of imprisonment in a cell varies greatly with the context and

concrete situation of the individual **[145].** Ordinary expectations and the ordinary conduct of life play a significant role in the assessment of whether there is a deprivation of liberty **[145].**

"Valid consent" in the sense used by the Strasbourg court in the context of the subjective limb of a deprivation of liberty is an autonomous concept (understood according to the case-law of the Strasbourg court) and is not to be equated with the concept of legal capacity in domestic law. The concept of "valid consent" is treated by the Strasbourg court as part of the definition of a deprivation of liberty; it is concerned with a person's de facto understanding of their situation and how they experience it. A person may not have mental capacity according to domestic law to make decisions about their care and residence arrangements, but if they have a basic level of awareness and consciousness of their living arrangements that is sufficient to enable them to know and communicate whether they are happy or unhappy with them, they may be treated as able to give or withhold "valid consent" to confinement by an expression of their wishes and feelings **[201]**.

The process of assessing whether there has been a deprivation of liberty is not always easy, and will be particularly difficult in borderline or marginal cases. Equally, it may sometimes be difficult to ascertain the true feelings or preferences of vulnerable individuals who do not have mental capacity to decide on their living arrangements. Where there is serious doubt, no inference of valid consent should be drawn **[53(v)**].

Is *Cheshire West* correct?

The Strasbourg court has continued to apply the multifactorial test in determining when an individual is deprived of liberty. It has never adopted an acid test, either generally or in the context of living arrangements of those who lack mental capacity**.** In setting out the acid test, the majority in *Cheshire West* went beyond the Strasbourg court's jurisprudence and departed from the long-standing multifactorial approach to determining when a person is deprived of liberty **[183]**.

The Supreme Court now concludes that the majority decision in *Cheshire West* was wrong in six particular respects.

First, the acid test is not sufficient by itself to show that there is a deprivation of liberty according to the Strasbourg court's case law**.** It may be relevant as part of the multifactorial test set out by the Strasbourg court, but to determine whether an individual is subject to a deprivation of liberty, the court must focus on their concrete situation and take account of the whole range of factors in the particular case, including the type, duration, effect and manner of implementation of the measures in question **[184]**.

Secondly, the majority in *Cheshire West* was wrong to conclude that a "*person's compliance or lack of objection*" is never legally relevant to the question of objective confinement. The Strasbourg cases demonstrate that there is some overlap between consideration of the objective and subjective elements of a deprivation of liberty **[187]-[192]**.

Thirdly, the acid test takes no account of the type of setting where an individual receives care and treatment. However, the normality of the circumstances in which an individual is cared for (eg the fact that they are living in their own home or in the community) is a relevant factor in assessing whether there has been a deprivation of liberty within the meaning of article 5 **[193]**.

Fourthly, the acid test takes no account of the fact that an individual might be subject to innate limitations by reason of their own physical or medical condition. The acid test therefore fails to reflect the need for coercion or some externally imposed restrictions on an individual that prevent them from exercising their fundamental right to physical liberty **[195]**.

Fifthly, the majority in *Cheshire West* were wrong to discount the potential relevance of the purpose for which measures of confinement were imposed **[200]**.

Sixthly, the approach of the majority in *Cheshire West* wrongly equates lack of legal capacity with lack of valid consent. If a person lacks legal capacity to make decisions about their care and residence arrangements, but nevertheless has a basic level of awareness about those arrangements which is sufficient to enable them to know and communicate whether they are happy or unhappy with them, then they can be treated as being able to give or withhold valid consent to confinement by an expression of their wishes and feelings **[201]**.

The Supreme Court therefore decides not to follow *Cheshire West* and overrules it **[207]**. In answer to the question referred, the Supreme Court concludes that the Minister would not be acting incompatibly with article 5 in issuing the proposed revised code, which neither authorises nor approves unlawful conduct in the form of a breach of the article 5 rights of individuals to whom it is applied. The Minister would be acting within competence in issuing it **[208]**.

References in square brackets are to paragraphs in the judgment.